

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

DONALD MCNAMEE,  
  
Plaintiff,  
  
vs.  
  
FREEMAN DECORATING SERVICES,  
INC.,  
  
Defendant.

Case No.: 2:10-CV-01294-GMN-PAL

## ORDER

Pending before the Court is Defendant Freeman Decorating Service, Inc.'s Motion for Summary Judgment (ECF No. 26). Plaintiff Donald McNamee has filed a Response (ECF No. 31), and Defendant has filed a Reply (ECF No. 32).

## I. BACKGROUND

In 1997, Plaintiff suffered a serious workplace injury in the course of his employment with Freeman Decorating Company, the predecessor entity of Defendant.<sup>1</sup> Plaintiff was compensated for his injury pursuant to the terms of the Nevada Industrial Insurance Act, codified in Chapters 616A through 616D.<sup>2</sup> In 2009, Plaintiff sought employment with Defendant as a forklift operator, in the capacity of a casual laborer through Local 631 of the International Brotherhood of Teamsters (“Local 631”). Defendant did not hire Plaintiff at this time. By letter dated December 2, 2009, Defendant told Local 631 that “Don McNamee may not work for Freeman as a Teamster in that he has not provided a suitable medical release to meet the physical requirements of the job.”

<sup>1</sup> The parties do not dispute that Defendant fully succeeded Freeman Decorating Company in all employment and contractual obligations.

<sup>2</sup> “Chapters 616A to 616D, inclusive, of NRS shall be known as the Nevada Industrial Insurance Act.” NRS 616A.005.

1 In April 2010, Plaintiff filed his Complaint (ECF No. 1-2) in state court, and  
2 Defendant subsequently removed the case to federal court in August 2010. (ECF No. 1.)  
3 Plaintiff's Complaint lists three claims for relief, alleging that Defendants: (1) violated  
4 the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* (1990)<sup>3</sup>; (2)  
5 violated Nevada Revised Statutes 613.330; and (3) retaliated against Plaintiff in violation  
6 of the Nevada Industrial Insurance Act, codified in Chapters 616A through 616D of  
7 Nevada Revised Statutes.

## 8 **II. LEGAL STANDARD**

9 The Federal Rules of Civil Procedure provide for summary adjudication when the  
10 pleadings, depositions, answers to interrogatories, and admissions on file, together with  
11 the affidavits, if any, show that "there is no genuine dispute as to any material fact and  
12 the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material  
13 facts are those that may affect the outcome of the case. *See Anderson v. Liberty Lobby,*  
14 *Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is  
15 sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See*  
16 *id.* "Summary judgment is inappropriate if reasonable jurors, drawing all inferences in  
17 favor of the nonmoving party, could return a verdict in the nonmoving party's favor."  
18 *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (citing *United*  
19 *States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A principal purpose of  
20 summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex*  
21 *Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

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24 <sup>3</sup> In its motion, Defendant refers to Plaintiff's disability discrimination claim as alleged under the  
25 Americans with Disabilities Act Amendments Act of 2008 (ADAAA). (Compl., 1:28, 2:23-27.) The  
ADAAA, Pub. L. No. 110-325, 122 Stat. 3553 (2008), amended the Americans with Disabilities Act of  
1990 (ADA), and became effective as of January 1, 2009. Although the ADAAA amendments included  
sections of the ADA discussed by Plaintiff, the Court will refer to Plaintiff's claims as brought under the  
ADA for the sake of clarity and consistency.

In determining summary judgment, a court applies a burden-shifting analysis. “When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party’s case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

### **III. DISCUSSION**

#### **A. Retaliation, Nevada Industrial Insurance Act, NRS Chs. 616A – 616D**

Because Defendant’s motion and Plaintiff’s Response both begin by addressing Plaintiff’s retaliation claim, and Plaintiff states that “[t]he heart and soul of this case is Mr. McNamee’s third claim for relief,” the Court will also begin with Plaintiff’s third claim alleging retaliation. (MSJ, 10:1; Pl’s Resp. to MSJ, 16:27.)

Plaintiff alleges that “Defendant disparately treated [him] by failing and refusing to hire him for an available position for which he was qualified, in direct retaliation for [his] having successfully sought compensation for a prior compensable work-related injury.” (Compl., 4:¶30.) Specifically, Plaintiff alleges that “[i]n failing and refusing to

1 hire [him] as a forklift operator notwithstanding his qualifications for the position, [Lind]  
2 stated that Defendant would not hire [him] because [he] ‘cost Freeman a lot of money,’  
3 specifically referencing [his] prior workers’ compensation claim.” (Compl., 4:¶29.)

4 In its motion, Defendant argues that Plaintiff’s third claim, alleging a retaliatory  
5 refusal to hire, is not a recognized cause of action in Nevada.<sup>4</sup> (MSJ, 2:13-14, 10:2-18.)  
6 Defendant is correct, and Plaintiff provides no statute, case law or argument to the  
7 contrary. Plaintiff does not even address this argument in his Response. Instead,  
8 Plaintiff briefly restates Nevada law relating to retaliatory firing, correctly citing *Hansen*  
9 *v. Harrah’s*, 675 P.2d 394, 396-97 (Nev. 1984) (per curiam) for the proposition that “[i]t  
10 is a violation of Nevada law for an employer to fire an employee in retaliation for making  
11 a claim for workers’ compensation benefits.” (Pl.’s Resp. to MSJ, 17:3-5, 3-20.) Plaintiff  
12 then skips over the threshold issue raised by Defendant to argue that *federal law* provides  
13 analogous authority for his claim that Defendant violated Nevada law by refusing to re-  
14 hire him in retaliation for his previous workers’ compensation claim. (Pl.’s Resp. to MSJ,  
15 17:3-23.) Plaintiff begins this argument with the statement that “the Nevada Supreme  
16 Court has not yet stated definitively how a plaintiff must prove unlawful retaliation in  
17 response to filing a workers’ compensation claim.” (Pl.’s Resp. to MSJ, 17:21-22.) This  
18 argument fails, however, because federal law is not a basis upon which Defendant can be  
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21  
22 <sup>4</sup> Defendant addresses Plaintiff’s claims in relation to the Nevada Supreme Court’s holding regarding  
23 retaliatory discharge in *Hansen v. Harrah’s*, 675 P.2d 394 (Nev. 1984) (per curiam). (MSJ, 10:7-9.) In  
24 *Hansen*, the Nevada Supreme Court “elect[ed] to support the established public policy of this state  
25 concerning injured workmen and adopt[ed] the narrow exception to the at-will employment rule  
recognizing that retaliatory discharge by an employer stemming from the filing of a workmen’s  
compensation claim by an injured employee is actionable in tort.” 675 P.2d 397. It held that retaliatory  
discharging an employee for filing workers’ compensation claims justified by work-related injuries “was  
repugnant to and violative of Nevada’s strong public policy in favor of protecting and providing for  
injured workers.” *Martin v. Sears, Roebuck and Co.*, 899 P.2d 551, 555 (Nev. 1995) (construing and  
citing *Hansen*, 675 P.2d at 396).

1 found in violation of Nevada law for this claim. Accordingly, the Court finds that  
2 Defendant is entitled to judgment as a matter of law as to Plaintiff's retaliation claim.

3 **B. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.***

4 **1. Legal Standard**

5 "The Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, as amended,  
6 42 U.S.C. § 12101 *et seq.*, makes it unlawful for an employer, with respect to hiring, to  
7 'discriminate against a qualified individual with a disability because of the disability of  
8 such individual.' § 12112(a)." *Raytheon Co. v. Hernandez*, 540 U.S. 44, 46 (2003). The  
9 ADA defines "discriminate against a qualified individual on the basis of disability" to  
10 include "denying employment opportunities to a job applicant or employee who is an  
11 otherwise qualified individual with a disability, if such denial is based on the need of  
12 such covered entity to make reasonable accommodation to the physical or mental  
13 impairments of the employee or applicant." 42 U.S.C. § 12112(b)(5)(B). "Reasonable  
14 accommodation" may include "job restructuring, part-time or modified work schedules,  
15 reassignment to a vacant position, acquisition or modification of equipment or devices,  
16 appropriate adjustment or modifications of examinations, training materials or policies,  
17 the provision of qualified readers or interpreters, and other similar accommodations for  
18 individuals with disabilities." 42 U.S.C. § 12111(9)(B). "To determine the appropriate  
19 reasonable accommodation it may be necessary for the covered entity to initiate an  
20 informal, interactive process with the individual with a disability in need of the  
21 accommodation." 29 C.F.R. § 1630.2(o)(3).

22 The statute also defines several terms, including "qualified individual" and  
23 "disability." A "disability" under the statute includes three categories: "(A) a physical or  
24 mental impairment that substantially limits one or more major life activities of such  
25 individual; (B) a record of such an impairment; or (C) being regarded as having such an

1 impairment.” 42 U.S.C. § 12102(2). Under the third category of disability, an individual  
2 must establish that he has been subjected to discrimination “because of an actual or  
3 perceived physical or mental impairment whether or not the impairment limits or is  
4 perceived to limit a major life activity.” 42 U.S.C. § 12102(3). However, this impairment  
5 cannot be “transitory and minor.” *Id.*

6 A “qualified individual” under the statute can “perform the essential functions of  
7 the employment position that such individual holds or desires,” “with or without  
8 reasonable accommodation.” 42 U.S.C. § 12111(8). The statute clarifies that  
9 “consideration shall be given to the employer’s judgment as to what functions of a job are  
10 essential, and if an employer has prepared a written description before advertising or  
11 interviewing applicants for the job, this description shall be considered evidence of the  
12 essential functions of the job.” *Id.*

## 13 **2. Analysis**

14 In his Complaint, Plaintiff alleges that on December 2, 2009, Defendant failed to  
15 hire him for the position of forklift operator in violation of the ADA, specifically 42  
16 U.S.C. § 12112. Plaintiff alleges that Defendant violated this statute because it  
17 unlawfully discriminated against him in “failing and refusing to hire him for an available  
18 position for which he was qualified and for which he could have performed the essential  
19 functions either with or without a reasonable accommodation.” (Compl., 3:¶17.) Plaintiff  
20 alleges that at that time he had a physical or mental impairment that substantially limited  
21 one or more major life activities, in that his impairment negatively affected his ability to  
22 lift objects, that he had a record of such impairment, and that he was regarded by  
23 Defendant as having such impairment. (Compl., 2-3:¶14.) Plaintiff alleges that  
24 Defendant was an employer as defined by the ADA under 42 U.S.C. § 12111(4).  
25 (Compl., 3:¶15.)

1 Specifically, Plaintiff alleges that at that time: (1) he was a qualified individual  
2 with a disability under the ADA because the impairment that inhibited his lifting ability  
3 was a recognized disability under the ADA, (2) that he was fully qualified for the position  
4 of forklift operator, (3) that he could perform the essential functions with or without a  
5 reasonable accommodation, and (4) that notwithstanding his impairment, Defendant  
6 failed to engage in an interactive process in order to determine his capabilities and  
7 appropriate job duties.

8 In its motion, Defendant argues that Plaintiff is not “disabled” within the meaning  
9 of the ADA, that he is not a “qualified individual with a disability,” that he was not  
10 “regarded as” disabled within the meaning of the ADA, that Defendant did not fail to  
11 accommodate or engage in an interactive process, and that Plaintiff cannot show pretext.  
12 (MSJ, 14-23.)

13 In responding to a summary judgment motion, a plaintiff may produce direct or  
14 circumstantial evidence or may invoke the three-step burden-shifting framework  
15 established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In the first step,  
16 the plaintiff must establish a prima facie case of discrimination or retaliation. *McDonnell*  
17 *Douglas*, 411 U.S. at 802. If the plaintiff succeeds at this first step, the burden then  
18 “shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its  
19 allegedly discriminatory conduct.” *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640  
20 (9th Cir. 2003). At the third step, if the employer articulates a legitimate reason, “the  
21 presumption of discrimination drops out of the picture, and the plaintiff may defeat  
22 summary judgment by satisfying the usual standard of proof required in civil cases under  
23 Fed. R. Civ. P. 56(c).” *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9th  
24 Cir. 2006) (internal quotations omitted).



1 In order to state a claim under the ADA, Plaintiff must first demonstrate that he is  
2 disabled within the meaning of the ADA. *Thompson v. Holy Family Hospital*, 121 F.3d  
3 537, 539 (9th Cir. 1997). In his Response, Plaintiff alleges that he meets this definition  
4 and cites the Work Evaluation prepared by R.W. Kudrewicz, M.D. on June 15, 2009 (Ex.  
5 8 to Pl.'s Resp. to MSJ). Plaintiff offers this Evaluation to show that he suffers from an  
6 impairment that substantially limits one or more major life activities. Under the prima  
7 facie standard, Dr. Kudrewicz's Evaluation is sufficient to establish that Plaintiff suffered  
8 from impairment at the time Defendant did not re-hire him.

9 The next question is whether Plaintiff demonstrates that he falls under one or more  
10 of the three categories of disability – actual disability, “record of” disability, or “regarded  
11 as” disabled. In his Complaint, Plaintiff alleged all three. In his Response, Plaintiff  
12 presents the Evaluation of Dr. Kudrewicz to support the “actual disability” category and  
13 the “record of” disability categories. The Court finds that this is sufficient to satisfy the  
14 prima facie standard for each of these two categories.

15 Finally, at Plaintiff's deposition he alleged that Defendant's executives made  
16 incriminating statements as explanation for Defendant's refusal to rehire Plaintiff,  
17 including, “It's Freeman's policy not to take people back after they've gone through a  
18 workman's comp thing like you” and “You cost Freeman a lot of money.” The Court  
19 therefore finds that these allegations are sufficient to satisfy the prima facie standard for  
20 the “regarded as” category. (*See* Pl.'s Dep., May 25, 2011, Ex. 1 to Pl.'s Resp. to MSJ.)

21 Plaintiff must also demonstrate that he was a qualified individual within the  
22 meaning of the ADA. Plaintiff alleges that Defendant sent him for a functional capability  
23 evaluation when he sought re-employment, for which he was rated ninety-two percent.  
24 (Compl., 2:¶11.) In his Response, Plaintiff alleges that because of this rating he could  
25 perform the essential functions of the forklift operator position with or without reasonable



1 accommodation. Plaintiff alleges that Defendant's General Manager, Allen Lind told  
2 him, "You lied to me. You said you were 100 percent." (Compl., 2:¶12.) Plaintiff  
3 contends that the forklift operator position did not require one-hundred percent, but  
4 Defendant argues that the job description for a Teamster specifically requires several job  
5 requirements that Plaintiff could not meet. (*See* Functional Capacity Evaluation, Ex. 2 to  
6 Feliciano Decl., ECF No. 26-2.) These requirements include the ability to walk on  
7 concrete continuously and lift, carry, push, and pull heavy objects. (Job Analysis, Ex. 1 to  
8 Feliciano Decl., ECF No. 26-2.) Plaintiff argues that these requirements for a Teamster  
9 are overbroad and exceed the actual requirements of a forklift operator. Giving due  
10 consideration to the Defendant's judgment as an employer as to what functions of the job  
11 are essential, and to the fact that Defendant had prepared a written description of the  
12 Teamster position before advertising or interviewing applicants for the job, this  
13 description shall be considered evidence of the essential functions of the job. Even with  
14 this consideration, Plaintiff has presented enough evidence that he was a qualified  
15 individual to satisfy the prima facie standard.

16 Since the Court finds that Plaintiff has established a prima facie case of  
17 discrimination, the Court must then consider whether Defendant has articulated a  
18 legitimate reason for its allegedly discriminatory conduct. Defendant's burden at this  
19 stage is to show that its reason for not hiring Defendant, i.e., that Plaintiff was not  
20 qualified for the Teamsters position as shown by the functional capacity report, was  
21 legitimate and nondiscriminatory. In its December 2, 2009, letter to Local 631, it said  
22 that "Don McNamee may not work for Freeman as a Teamster in that he has not provided  
23 a suitable medical release to meet the physical requirements of the job." The Court finds  
24 that Defendant has articulated and shown evidence of this legitimate non-discriminatory  
25 reason, and that Defendant has therefore met its burden under this second step.

1 Finally, the Court assesses whether the evidence shows a lack of genuine dispute  
2 as to all material facts under the usual Rule 56 standard. As discussed above, the parties  
3 have challenged the material facts at every level of this action, including: what the  
4 essential functions of the job were, whether Defendant was a “qualified individual,”  
5 whether Defendant’s stated reasons for not hiring Plaintiff were pretextual, and whether  
6 Defendant was impaired as defined by the statute. As the moving party, and because  
7 Plaintiff bears the burden of proof at trial, Defendant must present evidence to negate an  
8 essential element of the Plaintiff’s case, or demonstrate that Plaintiff failed to make a  
9 showing sufficient to establish an element essential to his case. The Court finds that  
10 Defendant has not met this burden, and that these disputes are genuine and relate to  
11 material facts. Accordingly, the Court will deny summary judgment as to Plaintiff’s  
12 ADA disability claim.

### 13 **C. Nevada Revised Statutes 613.330**

14 Under Nevada law, it is unlawful for an employer to fail or refuse to hire a person  
15 because of his disability. NRS 613.330(1)(a). Plaintiff alleges that “Defendant violated  
16 NRS 613.330 because it unlawfully discriminated against [him] in failing and refusing to  
17 hire him for an available position for which he was qualified and for which he could have  
18 performed the essential functions either with or without a reasonable accommodation”  
19 and “because it subjected [him] to disparate treatment because he was a qualified  
20 individual with a disability.” (Compl., 4:¶24-25.)

21 Claims for unlawful discrimination under NRS 613.330 are analyzed under the  
22 same principles applied to similar Title VII claims. *See Apeceche v. White Pine Co.*, 615  
23 P.2d 975, 977-78 (Nev. 1980) (comparing NRS 613.330 to section 703(a)(1) of Title VII  
24 of the Civil Rights Act of 1964 and analyzing NRS 613.330 according to federal  
25 precedent). Accordingly, the Court analyzes Plaintiff’s second claim as it analyzed his

1 first claim. As discussed above, the Court finds that there is a triable issue of material  
2 fact as to Plaintiff's disability claim.

3 However, Defendant also argues that Plaintiff's NRS 613.330 disability  
4 discrimination claim fails because he has not properly exhausted administrative remedies  
5 with the Nevada Equal Rights Commission (NERC). (MSJ, 23:25-26.) Defendant is  
6 correct. In order to pursue this claim, Plaintiff must have filed a timely charge of  
7 discrimination with NERC. *See Palmer v. State of Nevada*, 787 P.2d 802, 804 (1990)  
8 (restating the general "rule that exhaustion of remedies is required by NRS 613.420 prior  
9 to filing an employment discrimination action in court"). Plaintiff has presented no  
10 evidence that he did so and does not address this argument in his Response. Accordingly,  
11 the Court finds that Defendant is entitled to summary judgment as a matter of law as to  
12 Plaintiff's second claim.

#### 13 **IV. CONCLUSION**

14 **IT IS HEREBY ORDERED** that the Motion for Summary Judgment (ECF No.  
15 26) is **GRANTED in part** and **DENIED in part**. Plaintiff's second and third claims for  
16 disability discrimination and retaliation under Nevada law are dismissed, and  
17 Defendant's motion is granted as to these claims. Defendant's motion is denied as to  
18 Plaintiff's first claim for disability discrimination under the ADA.

19  
20 DATED this 4th day of April, 2012.

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24 Gloria M. Navarro  
25 United States District Judge